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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re O.V.,

a Person Coming Under the Juvenile Court
Law.

B208420

(Los Angeles County
Super. Ct. No. JJ15103)

THE PEOPLE,

Plaintiff and Respondent,

v.

O.V.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Donna Groman, Judge. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On May 15, 2007, a petition was filed in the Orange County Superior Court alleging that O.V. was a minor coming within the provisions of Welfare and Institutions Code section 602,¹ in that he committed forcible rape in concert (Pen. Code, § 264.1). It also was alleged that O.V. was not a fit subject for juvenile court under section 707, subdivision (c).²

On June 12, 2007, a petition was filed in the Los Angeles County Superior Court alleging that O.V. came within the provisions of section 602, in that he committed petty theft (Pen. Code, § 484, subd. (a)).

On July 24, 2007, O.V. admitted committing the forcible rape in concert as alleged in the Orange County petition, and the petition was sustained. The fitness allegation under section 707, subdivision (c), was dismissed. The case was transferred to Los Angeles County, where O.V. resided, for disposition.

On April 18, 2008, O.V. was ordered committed to the California Division of Juvenile Justice (DJJ) for a period not to exceed seven years, the middle term for the felony violation of Penal Code section 264.1. The pending Los Angeles Superior Court petition was dismissed in the interests of justice.

On appeal, O.V. claims ineffective assistance of counsel. We affirm.

FACTS

The victim reported to police that she spent the evening with an ex-boyfriend and two other men. After dinner, they went to the apartment of one of the other men. After a while, the victim noticed that her former boyfriend was gone, and she was the only

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

² O.V. was 17 years old at the time he committed the offense alleged in the petition.

female with six other men in the apartment. The men were smoking marijuana and drinking beer. The men walked up to her and carried her into a bedroom, where she was sexually assaulted by four of the men while the other men held down her arms and legs and covered her mouth to stop her screams.

According to the fitness report, O.V. initially stated that he had not seen the victim at the apartment. He eventually admitted he engaged in sexual intercourse with her, although he claimed that it was consensual. While being arrested and escorted for booking, he called the police officer derogatory names and challenged him to fight.

DISCUSSION

O.V. contends that his trial counsel provided ineffective assistance of counsel when she advised him not to cooperate in an Evidence Code section 730 evaluation ordered by the court. We disagree.

Our standard of review in determining whether defendant was denied effective assistance of counsel was specified by the Supreme Court as follows: “‘In order to demonstrate ineffective assistance, a defendant must first show counsel’s performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel’s performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]’ [Citation.] [¶] . . . ‘. . . “In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.” [Citation.]’ [Citation.]” (*People v. Majors* (1998) 18 Cal.4th 385, 403.) In reviewing a claim of ineffective assistance of counsel, we not only look at what counsel failed to do but also at what counsel did do at trial. (*In re Ross* (1995) 10 Cal.4th 184, 209.)

After O.V. admitted the charge filed in the Orange County petition, the matter was transferred to Los Angeles County for disposition. There were numerous hearings held from August 2007 until the disposition hearing on April 18, 2008. O.V. was represented by the public defender's office and, at the time of the disposition hearing, two attorneys appeared with him. For the disposition hearing, O.V.'s counsel, Sumita Dalal, filed a 15-page sentencing memorandum setting forth why placement at the DJJ was not appropriate. One of O.V.'s attorneys investigated alternative dispositions to DJJ, including the Regional Center, which declined to accept O.V. Ultimately, the trial court sentenced O.V. to DJJ.

At the time of the disposition hearing, the trial court considered numerous documents in addition to the public defender's memorandum. It reviewed the eight-page psychological assessment report from Douglas Allen, dated February 6, 2008. It also had the two-page report from Dr. Kojian, the court-appointed Evidence Code section 730 evaluator, who indicated that O.V. did not want to talk to him. There was a section 707, subdivision (c), fitness report prepared by the Orange County probation department and a 17-page psychological evaluation of O.V. from Jennifer A. Bosch, a clinical psychologist, dated July 2, 2007.

Attorney Dalal explained to the trial court that on "big cases" such as O.V.'s, the public defender's office assigns several attorneys, who each take a portion of the case. Deputy Public Defender Jan Datomi, the "expert on the [Division] of Juvenile Justice system," had been "assigned to this case long before [Dalal] was assigned" and had been working on it for "approximately a year" prior to the disposition hearing.³

O.V.'s attorneys provided the trial court with an explanation why O.V. had been advised not to cooperate with the Evidence Code section 730 evaluation. Attorney Datomi indicated that the risk assessment attempted in Orange County had not been successful because of O.V.'s lack of reading skills and his educational deficiencies. Dr.

³ Dalal had replaced O.V.'s previously assigned deputy public defender at the end of February or early March 2008.

Bosch's report discussed problems in testing due to O.V.'s reading and comprehension problems. While it is true that the trial court pointed out that O.V. had been given a certificate showing that he had participated in Operation Read, there is nothing in the record that would indicate that his reading skills and educational deficiencies had improved enough to provide a realistic assessment. Attorney Datomi also emphasized that any statements O.V. made to an expert appointed pursuant to Evidence Code section 730 would not be confidential and could affect him in the future, possibly in a sexually violent predator proceeding. After the explanation, the trial court replied, "I understand your point."

O.V. contends that he already had made non-confidential statements to the court-appointed expert in Orange County, and a new evaluation was necessary to overcome a recommended DJJ placement. The Orange County expert did not recommend DJJ, however, but provided an opinion that O.V. was an unfit subject for the juvenile court.⁴

O.V. has failed to show that his counsel provided inadequate representation. His counsel had valid reasons for advising O.V. not to cooperate in the Evidence Code section 730 evaluation.

Even if the record shows that O.V. received ineffective assistance of counsel, O.V.'s claim must be rejected because the record fails to show prejudice from counsel's advice. Assuming O.V. had cooperated with the Evidence Code section 730 evaluation, it is pure speculation as to the recommendation that would have been made by the evaluator or whether the trial court would have gone along with the recommendation, if favorable. As defense counsel mentioned in response to the court's disappointment in not having the additional information it sought from the court-appointed expert, "Maybe we could [have] had it if we had the doctor. Maybe it would have turned out okay. Maybe it would not have. Maybe it would have been worse. We don't know."

⁴ The Los Angeles County probation officer's report recommended placement in the California Youth Authority, now known as DJJ, and the prosecutor argued for DJJ placement.

At the disposition hearing, the trial court stated that “when I stated that it’s really unfortunate that he didn’t participate [in the evaluation], it was because I had anticipated that there might [have] been a likelihood if he had been evaluated that we might get some more information that would be helpful to him.” Certainly the trial court’s comments do not show a reasonable probability that the result of the disposition hearing would have been different if O.V. had cooperated in the evaluation.

DISPOSITION

The disposition order is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.